

Sun (Migration) [2023] AATA 3337 (31 August 2023)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Biwei Sun
CASE NUMBER:	2301029
HOME AFFAIRS REFERENCE(S):	BCC2021/1266350
MEMBER:	Penelope Hunter
DATE:	31 August 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 31 August 2023 at 1:39pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – subclass 500 (Student) visa – false or misleading information – a bogus document – Identity Card details provided with the applicant’s original visa application was a bogus document – not satisfied that the evidence and submissions advanced by the applicant demonstrate compelling circumstances – failed to meet the criteria in PIC 4020(1) – requirements of PIC 4020 can not be waived – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 65, 376, 499
Migration Regulations 1994, r 1.03, Schedule 2, cl 500.217*

CASES

*Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 7 January 2023 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 18 June 2021. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217(1) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because they found that the applicant had not complied with Public Interest Criteria 4020 (PIC 4020). Further, the delegate found that there were no compassionate or compelling reason to just waive PIC 4020. A copy of the delegate's decision record was provided to the Tribunal by the applicant with the application for review.
6. The applicant appeared before the Tribunal on 29 August 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance on an interpreter by telephone in the Mandarin and English languages.
7. For the following reasons, the Tribunal has concluded that decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets PIC 4020 as required by cl 500.217(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

10. Non-Disclosure Certificate

11. On 7 February 2023 the Department issued a certificate under s 376 of the Act in relation to certain electronic documents on the applicant's Department file. Section 376 applies to decisions under part 5 of the Act and provides that where the Minister has certified in writing that disclosure of a document or information would be contrary to the public interest, the Tribunal's use and disclosure of the material is subject to the provisions of ss 376(3) of the Act. However, the operation of s 376 is dependent upon the existence of a valid certificate by the Minister or his delegate.
12. In this case the Tribunal formed the preliminary view that the certificate was valid. It is signed and dated by the relevant officer. It clearly identifies the documents to which it purports to apply and the grounds for the claim of confidentiality, that is the information contains details of a Department's officer and that it may disclose the identity of a confidential source of information, endanger the life or physical safety of the person and also disclose lawful methods for preventing, detecting and investigating breaches or evasions of the law which would likely lead the applicant to find out how the Department conducts its internal processes and may affect the capacity to use those methods. The applicant was provided with a copy of the certificate prior to the Tribunal hearing, and again at the Tribunal hearing. He was invited to comment as to validity at the hearing and advised the Tribunal that he did not wish to offer any comments or submissions disputing the validity. The Tribunal finds that the certificate is valid.
13. Insofar as the certificate applied to information relevant to the review, it is noted that this information was disclosed to the applicant by the Department in their invitation to comment and within the delegate's decision record provided to the Tribunal, as discussed below.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
17. The applicant is a 23 year old citizen of China, from Fuzhou in Fujian Province.
18. The visa application was the second student visa sought by the applicant, he was proposing study in an Advanced Diploma of Leadership and Management, with course dates from 1 February 2021 to 29 January 2023, and then a Graduate Diploma of Management

(Learning) with course dates from 6 February 2023 to 4 February 2024. The visa he held previously was also a student visa, that he applied for on 10 August 2018 and was granted on 20 August 2018 (the first visa application). While the holder of this visa he had undertaken study in a Diploma of Business.

19. On 14 July 2022, the Department wrote to the applicant and invited comment on information given to the Department in relation to his first student visa application. The delegate sets out in their decision record, that with his first visa application a document had been provided titled "identity card.jpg" and this purported to be a National Identity card valid from 11 March 2017 with an ID number ending in 92810. The document was identified as non-genuine because when attempts were made to verify it, no matching record existed in the system.
20. On 10 August 2022, the applicant provided a response to the Department, and advised the following (in summary):
 - When he first applied to study in Australia in 2018, he was nearly 18 years old and asked an agent Mr Liqiang Cai, of Wanda Travel Agency, to apply for the student visa on his behalf. The agent had visited their village promoting his service. He made a promise of "no visa, no fee".
 - He contacted his father after the receipt of the Department's invitation to comment and his father could no longer get in touch with the agent. They were informed that Mr Liqiang Cai had passed away and the business had moved to another place. No one could provide an explanation as to the issue with his National Identity Card and why it had been changed.
 - The applicant and his father confirm that they had provided Mr Cai with the correct documents. They did not know that the card number for the National Identity card provided with his previous student visa application was changed. He thinks that the agent thought that an applicant from a big city like Fuzhou City would more easily get a student visa granted rather than someone from a small place like his city, Fuqing.
 - The National Identity card that he provided with the review application was genuine.
 - Neither the applicant, nor anyone in his family, asked Mr Liqiang Cai or Wanda Travel Agency to alter his National Identity Card. It was done without his knowledge or permission.
 - He was from a remote and backward countryside area in China and his parents were not familiar with visa applications. They knew little Chinese language let alone English and his English was not that good. They relied on the agent.
 - He had a good academic record since he started studying in Australia and had abided by all Australian laws and rules. He hoped that the case officer could forgive him and accept that he did not knowingly provide the ID card with the changed card number.
21. The delegate considered the response of the applicant but noted that each visa applicant is responsible for the authenticity of the documents and the accuracy of the information submitted with the visa application. Consequently the delegate found that the applicant had provided a bogus document within the meaning of s 5(1) of the Act.
22. The Tribunal received an application for review from the applicant on 27 January 2023.

23. On 14 August 2023, the applicant submitted additional documents including a copy of his Diploma of Business and record of results, an untranslated copy of his birth certificate, an untranslated webpage screenshot, and an undated statement. In his statement the applicant set out that due to a change in his circumstances he was currently enrolled in a Certificate IV in Marketing and Communication until 18 February 2024, then a Diploma of Marketing and Communication from 18 March 2024 to 16 March 2025 and lastly an Advanced Diploma of Marketing and Communication from 14 April 2025 to 11 April 2027. The applicant also provided information aimed at addressing the genuine temporary entry criteria for the visa, and again claimed that neither he nor his family had asked Wanda Travel Agency to alter his ID card. He submitted that it was done without their knowledge or permission. He claimed that his English skills at the time were insufficient to scrutinise the details of his visa application. The applicant further stated that he fully accepted the refusal and acknowledged that including fraudulent information in a visa application was a serious offence.
24. On 23 August 2023, the applicant provided further documents and submissions to the Tribunal including a transcript of academic progress in his Certificate IV in Marketing and Communication, a statement of financial support from his parents, an untranslated Personal Certificate of Deposit and screenshots of WeChat messages with his mother, aunt, brother, friends and cousin.
25. At the Tribunal hearing the applicant gave an account consistent with his written submissions. He claimed only to have learned about the issue with his identity card when invited to comment by the Department. He said that he had heard from other travel agents the reason why Mr Liqiang Cai had altered his National Identity card.
26. The applicant agreed that the identity card submitted with his first student visa application was different from that submitted with the review application. He claimed that the documents he relied upon with the current review application were genuine. He conceded that he had never held an identity card in the numbers 92810 that was issued on 11 March 2017 and that the documents providing this card were not genuine. The Tribunal is satisfied from the applicant's concessions and the investigations of the Department that the Identity Card details provided with the applicant's original visa application was a bogus document within the meaning of s 5(1) of the Act. That is it is counterfeit and has been altered by someone without the authority to do so and purports to be issued in respect of the applicant, but was not, issued in respect of the applicant.
27. The Tribunal further finds that this document was submitted with the first visa application granted on 20 August 2018, and that this was the visa held by the applicant in the period 12 months before the current visa application was made.
28. The Tribunal has considered the claims of the applicant about his agent being at fault and the poor language abilities of the applicant and his family. It is not satisfied that they absolve him of responsibility for the documents that were submitted on his behalf. The Tribunal discussed with the applicant the scope of the authority that he provided to Mr Liqiang Cai. He confirmed that he instructed him to apply for a student visa to Australia and paid him a fee for his services. The applicant told the Tribunal that he had provided the agent with authentic documents and information but that he permitted Mr Liqiang Cai to complete the application on his behalf. He did not seek to check the application before it was submitted or review any forms or documents. He asked Mr Liqiang Cai to apply for a business course in Sydney, but the actual course and provider of the course were decisions left to the discretion of the agent. He further instructed Mr Liqiang Cai to lodge the application to the Department on his behalf. The Tribunal finds that the broad scope and complete authority provided to the agent by the applicant is not sufficient for him to avoid responsibility for the application. It demonstrates an indifference as to how the agent would secure a favourable visa outcome.

Furthermore, the applicant confirmed at the hearing he allowed the agent to complete the form on his behalf which is accompanied by the declarations which state that he:

- Has provided complete and correct information in every detail on the form, and on any attachments to it.
- Understand that if any fraudulent documents or false or misleading information has been provided with the application, or if the applicant fails to satisfy the Minister as to their identity, the application may be refused and the applicant(s) or any member of their family unit, may become unable to be granted a visa for a specified period of time.

29. The Tribunal does not dispute the claims of the applicant that he may not have created the relevant National Identity card ending in 92810. PIC 4020(i) does not require that the applicant be shown to have been complicit in the provision of the document, all that is necessary is that the document is purposely false. The applicant has provided a motive for the action, that is to assist in a more favourable visa outcome. The Tribunal is not satisfied that the creation of the document provided by the agent engaged by the applicant and his family was an innocent mistake. It follows that the Tribunal is not satisfied that there is no evidence that the applicant has given, or caused to be given to the Minister, or an officer of the Department a bogus document within the meaning of s 5(1) of the Act.

30. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

31. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

32. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

33. According to the Explanatory Statement it was intended that the granting of the waiver would relate solely to compelling circumstances affecting Australia's interests, or the compassionate and compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant.¹ The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 identified in the Explanatory Statement include:

¹ Explanatory Statement to SLI 2011, No 13, at 19. The Court in *Vyas v MIMAC* [2013] FCCA 1226 found the ES to be of assistance in considering the plain words of the waiver provision such that it could not be said that it would be sufficient for the applicants to demonstrate that their circumstances were compelling or compassionate alone, but that there has to be a connection with Australia or an Australian citizen or permanent resident, or eligible New Zealand citizen, because otherwise there would be no utility in having those words in the clause (at [14]).

- family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
- that family members in Australia would be left without financial or emotional support; and
- a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period).²

34. In addition, the Department's guidelines suggest that there may be compelling circumstances affecting the interests of Australia if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa (noting that gaining employer sponsorship is not considered sufficient grounds for a waiver); or
- Australia's relationship with a foreign government would be damaged were the person not granted the visa; or
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.³

35. The Department's policy guidelines further state that compelling circumstances affecting the interests of Australia would not include circumstances where the non-citizen merely claims that, if granted the visa, they would work and pay taxes in Australia, pay fees to an education provider or spend money in Australia.⁴

36. The applicant in his submissions has discussed hardships he experienced with having to change courses and upon finding out about the actions of his previous agent. He has completed a course while holding his first visa and has attempted further study. He claims that his parents have sufficient funds to pay for the further study he proposes over the next 3.5 years. The Tribunal acknowledges these submissions but is not satisfied that they give rise to compelling reasons affecting the interests of Australia or a compassionate or compelling reason affecting the interest of an Australian citizen, permanent resident or eligible New Zealand citizen.

37. At the hearing the applicant advanced a further three reasons for the waiver. Firstly, he addressed Australia's education and submitted that he thought it was at a superb level and he considered that nothing in China could compare to it. He said that his purpose for being in Australia was to complete his study and learn more about business and marketing and return to China to apply his knowledge to his career. Secondly, he said that he had paid his course fees and living costs to date while in Australia and his ongoing presence and payments contributed to the Australian economy. Thirdly, the applicant claimed that the Australian culture had changed him a lot and he had improved his language ability and boosted his confidence. He claimed that it was an invaluable experience and had improved his life ethically and culturally. The Tribunal accepts the claims of the applicant that he has gained a lot from his study in Australia and could benefit further if he was granted the visa to

² Explanatory Statement to SLI 2011, No 13, at 19–20.

³ Policy –[Sch4 4020] – Public Interest Criterion 4020 – The Integrity PIC – Compelling and/or compassionate circumstances –Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).

⁴ Policy –[Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).

undertake his further proposed study. He also conceded to the Tribunal that if the visa was not granted, his family had the resources for him to undertake relevant study in his home country or as an international student in another country. The Tribunal also accepts that he has paid fees and taxes on his wages while working in Australia. However, the payment of fees and taxes are contributions all international students provide, they do not mark the circumstances of the applicant as compelling. The Tribunal also takes note of Department policy guidelines as identified above, and while not bound by policy does not consider in the particular circumstance the applicant's economic contribution rises to the level of compelling. Considered either singularly or plurally, the Tribunal is not satisfied that the evidence and submissions advanced by the applicant demonstrate compelling circumstances affecting the interests of Australia or a compassionate or compelling circumstances affecting the interest of an Australian citizen, permanent resident or eligible New Zealand citizen.

38. It follows that the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived.
39. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217(1). The Tribunal is also not satisfied that the applicant meets the criteria for any category within the student visa subclass.

DECISION

40. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Penelope Hunter
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...